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No. 1126

UNITED STATES SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

No.6944

VELMA S. PALMER
Apartado 75
LA LINEA
(Cádiz) SPAIN

VELMA S. PALMER
Plaintiff, Appellant

v.

ARTHUR E. NISSEN
Defendant, Appellee

UNITED STATES SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

No.6944

VELMA S. PALMER
Plaintiff, Appellant

v.

ARTHUR E. NISSEN
Defendant, Appellee

The Appellant, Velma Spencer Palmer, hereby petitions the United States Supreme Court for a writ of Certiorari from the opinion and order of the First Circuit Court of Appeals dated September 25th, 1967 which affirmed the denial for additional costs by the Federal District Court in Case No.6944.

PER CURIAM: Without reaching the question of the extent to which a party, whether a member of the bar or otherwise, is liable for counsel fees incurred in successfully prosecuting a suit against him for damages, we hold, at a minimum, that Plaintiff was correct in assuming in the District Court that she must establish that the defense of the suit was maintained in bad faith, vexatiously or wantonly. The Court found against her on that issue. On this appeal the burden is on her to show that the Court was necessarily wrong and unjustified, and that the evidence compelled a conclusion favourable to her. This is a heavy burden. We find she has not met it. The case accordingly, stands under the general rule that each party, so far as counsel fees are concerned, bears his own.

Affirmed.

In this Brief, page references to Appellant's Record Appendix will be R. and to Appellant's Brief will be RB. and to Appellant's Reply Brief will be RRB.

The facts and evidence in Appellant's Brief and Reply Brief with Appendix compel the conclusion that the Attorney Defendant under 6 Moore Federal Practice Paragraph 54.77 (2) at 1352 did maintain unfounded defences, vexatiously, wantonly, and in bad faith, and that the District Court was wrong and unjustified in denying the Plaintiff's claim for additional costs. The facts and evidence in the Appellant's Brief and Reply Brief with Appendix compel the conclusion that the Federal District Court did not accord the Appellant equitable treatment, or equitable discretion, and the unethical and inequitable treatment accorded the Appellant by the Court compels the conclusion that the Federal District Court was unable to use equitable discretion in the decision on costs to the detriment of the Plaintiff. Therefore the First Circuit Court of Appeals was wrong and unjustified to affirm the decision of the Federal District Court.

It is conceded that the Brief and Reply Brief submitted by Appellant may not be in the language and order of the legal profession but the facts and evidence are all there and compel a conclusion favourable to the Appellant.

The facts and evidence compel the conclusion that the Attorney Defendant did make groundless denials, tortured constructions, maintained unfounded defences, in a vexatious, wanton and oppresive manner and in bad faith, arguing back of his work and assurance as an Attorney and professional man with no moral or legal grounds, ignoring and denying the opinion and order of the Court, making statements contrary

to fact, inconsistant statements, and took advantage of his position as an Attorney all to the detriment of the Plaintiff, and making the amount of effort the Plaintiff had to go to to secure relief unreasonable and put them to the expense of an extended damage suit. All of these facts and evidence are set forth in Appellant's Brief 1 thru 32 and Appellant's Reply Brief 1 thru 8 and it is a fact that the Attorney Defendant did act in a manner as stated above therefore the Court was necessarily wrong and unjustified in denying the Plaintiffs additional costs.

The facts and evidence compel the conclusion that the Court did allow the Defendant Attorney to act in a manner, as was done in this case, (RB 1 thru 32)(RRB 1 thru 8) and that an indictment by the Federal District Court under 6 Moore Federal Practice Paragraph 54.77 (2) at 1352 of the Defendant Attorney's conduct in this case would necessarily be an indictment of the Federal District Court itself. It must be conceded that when the Federal District Court allowed the Attorney Defendant to act in a manner as was done in this case it was wrong and unjustified, and the evidence compels the conclusion that the Court showed prejudice on behalf of its brother with unethical and inequitable treatment to the detriment of the Plaintiff throughout the entire case (RRB 1 thru 8).

The facts and evidence compel the conclusion that the errors in judgment and mis-statements of facts in analysis and factual findings by the Federal District Court did not warrant denial of the claim of Plaintiffs for additional costs and the Federal District Court was wrong and unjustified (RRB 1 thru 8).

(1) The Federal District Court was wrong and unjustified in allowing the Attorney Defendant to sit in on the February 17th pre-trial conference held to determine the issues upon which his liability would be tried, to the exclusion of the Plaintiff (RRB 5, 6)(RB 28).

(2) The Federal District Court was wrong to point out to our only Attorney witness on title in the liability trial how he could refuse to testify as an expert (R 31) and the Court also showed prejudice when it stated that it wished it were not sitting on the case (R 32). The Plaintiffs lost the issue on title and were burdened with the costs of clearing the title. The opinion and order of the Court stated (R 52) "Plaintiffs offered no evidence in support of their contention --" and under footnote 8 (R 52) it stated, "The only witness called by Plaintiffs -- was unable to express an opinion --."

(3) The Federal District Court was wrong to allow the Plaintiffs' Attorney to withdraw leaving Plaintiffs without counsel halfway through and in an inequitable position to conclude the litigation (R 64, 65)(RB 6)(RRB 6 (3)). It is a fact that the chances were substantial that when the Plaintiffs were left without counsel in the damage part of the action and with an unpublished decision in the liability trial there would be a forced settlement out of Court (RB 6, 7, 8).

(4) The Court was wrong in the damage trial over objection of Plaintiffs counsel to allow the Attorney Defendant to argue back of his work and assurance given as an Attorney and professional man (RB 18) in the face of the opinion and order which,

by its finding, established that the 3.7 acre parcel was included in the purchase and sale agreement thereby determining the status knowledge of the parties at the time of signing the agreement December 2nd, 1958 (R 64)(RB 6) and in the face of the Defendant's title certificate of January 12th, 1959 and curative deed (Exhibits 5 & 6)(R 40, 41) entered in the liability trial (RB 4, 5, 6) which certified title to all described in sale agreement of December 2nd, 1958.

(5) The Court was wrong to allow the Attorney Defendant to ignore and deny the opinion and order of the Court (RB 19, 20) and over objection of counsel to retry his liability in the damage part of the action before the jury causing an extended damage trial (RB 18)(RB 6 thru 13)(RB 15 thru 25).

(6) The Court was wrong to argue as was done in this case and in effect saying that no-one should rely on his lawyer or have a right to so rely (R 104, 105)(RRB 4) and it could be assumed that from the above the Court would also misconceive the special issue of the argument for costs in which Plaintiffs maintained that an Attorney must be held to a higher standard than an ordinary litigant in the Courts of the land and this case could not be compared to the average personal injury case as was suggested by the Court (R 178)(RB 29, 30, 31)(RRB 4).

(7) After special jury verdict (R 3) of the date of March 1964 and award of $18,000 the Court asked Plaintiffs to waive interest (R 134) pointing out that if Plaintiffs did

not waive interest the Court would require procedures which would entail expenditures substantially more than the amount of interest involved. This had been the tenor of the entire case to make it so expensive that the Plaintiffs would give up.

(8) When the Court awarded damages of only $600 (R 3) of a ligitimate $5,874 listed in Plaintiffs' Brief (R 149 thru 151) and only $99.10 of interest awarded in exercise of the Court's equitable discretion, it must be conceded from the above that the Court would not in exercise of its equitable discretion award additional costs as sought by Plaintiffs (R 154 thru 157) (RB 32).

(9) The Court was wrong to state that the initial damages claimed in Plaintiffs pre-trial memorandum (R 14, 15) shows in an area of $70,000 to $80,000 (R 180, 181). This misstatement of fact is covered in Plaintiffs Reply Brief page 7, also Plaintiffs Brief pages 2 & 3, which shows that Plaintiffs pre-trial memorandum under no.5 states, "The proper measure of damages -- is the DIFFERENCE between the expenses incurred by the Plaintiffs in purchasing and improving the land -- and the fair market value today of the property they hold", and under no.7 of Plaintiffs pre-trial memorandum it states, "In the alternative and without regard to defects in title (which was the case in the damage part of the action) the Plaintiffs submit the damages claimed in affadavit in support of jurisdictional amount ($17,950) executed by Velma S. Palmer on March 7th, 1965" (R 8, 9, 10).

The statement by the Court that, "The Defendant was entitled to contest that amount of damages ($70,000 to $80,000) and it was contested both through the pre-trial proceedings, and through settlement discussions which were had, and at the damage hearing", are also mis-statements of fact (R 181). The Plaintiffs made an offer of settlement at the September 26th, 1966 pre-trial conference preceding the jury trial on damages. At the request of the Court (RB 7)(R 69):

> the Plaintiffs offered a settlement of $25,000 difference in value for the loss of the land. The Defendant offered a settlement of $5,000 to clear up the whole thing (R 70). The jury verdict of $18,000 for the difference in value for the land lost (R 3 (2)) shows conclusively that the Defendant was unreasonable and unrealistic.

The highest amount in damages set before the jury by Plaintiffs' expert was $25,000. The highest amount in damages set before the jury be Defendant's expert was $5,000 as evidenced by the Court's charge to the jury (R 133) so that there never was an amount of $70,000 or $80,000 before the jury, or in the settlement discussions, or in the initial damages claimed by Plaintiffs in their pre-trial memorandum dated September 13th, 1965 (RB 2 & 3), and all set forth on page 7 of Plaintiffs Reply Brief, also Plaintiffs Brief page 29.

On these mis-statements of fact the Court suggested (R 181) that, "Mr. Nissen cannot be charged with bad faith or dilatory tactics or vexatious litigation or breach of any conduct as

an Attorney by the act of defending this law suit in which liability was reasonably disputed and certainly the amount of damages claimed by the Plaintiffs was reasonably disputed". The amount of money involved is irrelevant to the argument for additional costs in this case because the evidence and jury verdict compels the conclusion that the amount of damages asked throughout by Plaintiffs was fair and justified and the Attorney Defendant's conduct in defending this law suit as to liability as well as damages was unfounded and unreasonable (RB 1 thru 32)(RRB 1 thru 8).

Through the unfounded defenses carried vexatiously, wantonly and in bad faith this case has not only cost almost double the amount of the jury award but has taken an extraordinary amount of Plaintiffs' time and effort to conclude this litigation. In this case the Plaintiffs had two choices, one was to accept the loss and do nothing conceding that there is no justice for a client who has been injured by his Attorney, the second is to retain counsel, if one can be found, and seek legal redress. Under the second alternative the chances are substantial that the cost of litigation particularly legal expenses and expert witness fees will exceed the claim for damages. Neither of these alternatives is satisfactory for a well ordered legal system or a well regulated legal profession. If these are the only choices open to a person injured by Attorneys, then it is clear, the legal professions and the Courts of this country, of which Attorneys are officers, are failing to meet their obligations to the public.

This case and argument for costs involves the integrity and ethics of the legal profession and in the conclusion of Plaintiffs Brief (RB 29, 30, 31) it is pointed out that there is no-one to police the legal profession but the profession itself. It is submitted

only that if an Attorney Defendant undertakes his defenses in a manner as was done in this case and if the ultimate substantive determination of the action results in a clear refutation of his defenses, then simple justice and the integrity of the legal profession require that the Attorney Defendant defray all of Palintiffs' expenses in obtaining justice.

Therefore we respectfully urge that the United States Supreme Court, as a Court of last resort, grant the petition for a writ of Certiorari and review this case at no further cost or effort to the Appellant. The Appellant in this case has been in Europe on personal matters since September 12th, 1967 and will not return until May 1st 1968 and it is urgently requested that this case not be turned down through failure to meet printing or other technical requirements.

CONCLUSION

(1) The facts and evidence in Appellant's Brief, Reply Brief with Appendix compel the conclusion that the Attorney Defendant under 6 Moore Federal Practice Paragraph 54.77 (2) at 1352 did maintain unfounded defences, vexatiously, wantonly, and in bad faith.

(2) The facts and evidence in Appellant's Brief, Reply Brief with Appendix compel the conclusion that the Federal District Court did not accord the Appellant equitable treatment, or equitable discretion, and the unethical and inequitable treatment accorded the Appellant by the Court compels the conclusion that the Federal District Court was unable to use equitable discretion in the decision on costs, particularly Attorneys fees and expert witness fees as sought (R 154 thru 157) to the detriment of the Plaintiffs.

(3) The facts and evidence compel the conclusion that the Federal District Court was wrong and unjustified in denying the Plaintiffs' claim for additional costs as sought (R 154 thru 157).

(4) The facts and evidence compel the conlcusion that therefore the First Circuit Court of Appeals was wrong and unjustified to affirm the decision of the Federal District Court.

(5) The facts and evidence compel the conclusion that when an Attorney Defendant undertakes his defenses in a manner as was done in this case, this case is lifted out of the ordinary.

We therefore respectfully urge for reasons herein set forth that Plaintiffs' appeal, from the order by the First Circuit Court of Appeals affirming the denial of the Federal District Court for additional costs, be reversed and the United States Supreme Court in awarding a decision favourable to Appellant will exert a profound influence on the legal profession and will be justified as having been made for dominating reasons of justice.

Respectfully submitted

Velma S. Palmer

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Certificate of Serivee

This is to certify that a copy hereof was this day mailed to William B. Mahoney Esq. and Lawrence P. Mahoney Esq., 120 Exchange Street, Portland Maine with posage certified and prepaid